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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Denied

No. 940

CARIBBEAN EMBROIDERY COOPERATIVE, INC., SANTIAGO R. PALMER, AND MAGDALENA J. PALMER,

Petitioners,

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

JAMES R. BEVERLEY,
RAFAEL SOLTERO PERALTA,
Counsel for Petitioners.

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To the Honorable the Justices of the Supreme Court:

Your petitioners, Caribbean Embroidery Cooperative, Inc., Santiago R. Palmer and Magdalena J. Palmer, pray a writ of certiorari to review the judgment of the Circuit Court of Appeals, First Circuit, entered in this cause on November 18, 1941, reversing the judgment of the United States District Court for the District of Puerto Rico entered September 19, 1940.

Questions Presented.

This petition involves four questions:

(1) Whether the Fair Labor Standards Act of 1938 (52 Stat. 1060 U. S. C. Title 29, par. 201 et seq.), fixing minimum wages and maximum hours of work to employees who work in the production of goods for interstate commerce, is applicable to a cooperative of production wherein the workers are the sole owners and have complete control of the operation of the business, and share the net income according to the class of work done and to the hours worked.

(2) Whether such cooperative a "labor organization" within the meaning of Section 3(d) of the Fair Labor Standards Act, which exempts "labor organizations" from the provisions of the Act.

(3) Whether the petitioner, Caribbean Embroidery Cooperative, Inc., of San Germán, Puerto Rico, a cooperative organized under the Puerto Rican Cooperative Law (laws of Puerto Rico, Act No. 3 approved May 6, 1920, page 30), is dominated by the petitioners Santiago R. Palmer and Magdalena J. Palmer, at present Manager and Assistant Manager respectively of the Cooperative, to such an extent as to vitiate the organization of the Cooperative.

(4) In either event, whether an employer-employee relationship exists between the Palmers or the Cooperative or either of them on the one hand and the labor-members of the Cooperative on the other hand.

Summary Statement.

Prior to the passage of the Federal Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A. 201 ff.), the petitioners Santiago R. Palmer and his wife, Magdalena J. Palmer, owned and operated at San Germán, Puerto Rico, a business which produced handmade needlework articles,

especially handkerchiefs, for the United States market. After the passage of the above mentioned Act on June 25, 1938 by the Congress of the United States, it became evident to the Palmers that they could not continue in business after the effective date of the Act since the wages which would have to be paid under the federal Act far exceeded the gross income of the business. While considering the effect of the closing down of the business, not only on himself but on the large number of workers involved, Mr. Palmer, in conversation with an attorney, Juan Enrique Soltero, evolved the idea that the workers themselves might take over the business as a labor cooperative, sharing in the entire net earnings of the industry in accordance with the hours worked by each labor member. He discussed this with some of the leaders among the workers and a meeting was called of the workers to determine whether or not to attempt to form such a cooperative (R. 913, 914, 931, Exhibit 1 plaintiff, R. 36). The workers and their advisors understood that in a labor cooperative where the work of the members was pooled and the resulting income was divided among themselves on a basis of work done, the organization would not fall within the terms of the Federal Fair Labor Standards Act (R. 36-41, 46-47).

After a meeting of the workers was held, the workers decided to form such a labor cooperative as had been discussed and did so. The Articles of Incorporation under the special Puerto Rican law for creating cooperatives were adopted (Exhibit 1 plaintiff, R. 36) and appropriate by-laws were adopted (Exhibit 2 plaintiff, R. 63-131).

Mr. Palmer encouraged the formation of the Cooperative and subsequently entered into contracts with the cooperative whereby he became Manager, subject to the control, of course, of the Board of Directors of the Cooperative, and he also leased his machinery and buildings to the Cooperative (R. 279, 293, 298). The Cooperative commenced

to function under its own officers and Board of Directors until the present suit was brought against it by the Administrator of the Wage and Hour Division of the United States Department of Labor.

The bases of the Administrator's suit were, first, that this was not a genuine cooperative but in fact an instrument of the Palmers, and, second, that even if it were a genuine labor cooperative it would nevertheless fall within the provisions of the Federal Fair Labor Standards Act.

After a long trial, the trial Court found that the Cooperative was voluntarily formed, that it was owned and controlled by the member workers and not by Palmer and the Court held as a matter of law that there was no employer-employee relationship between the Cooperative and the member workers thereof (R. 30). The trial Court refused to enjoin the defendants from shipping and selling goods made exclusively by the worker members of the Cooperative, but did enjoin them, and we think correctly, from selling or shipping goods in interstate commerce upon which non-members of the Cooperative (home workers) had worked when such home workers had received less than the statutory minimum wage (R. 33).

On appeal to the Circuit Court of Appeals for the First Circuit this Court reversed the holding of the United States District Court for the District of Puerto Rico on November 18, 1941 and held that on the facts presented the Cooperative was dominated and controlled by Mr. and Mrs. Palmer and that the Cooperative is not a "labor organization" within the meaning of Section 3(d) of the said Fair Labor Standards Act of 1938 (R. 958-982).

Reasons Relied Upon for the Allowance of the Writ.

The question of whether a labor cooperative is exempt from the provisions of the Federal Fair Labor Standards Act of 1938 is an important one, which we believe should be passed upon by this Court, from two standpoints: first,

whether it is a "labor organization" expressly exempted by Section 3(d) of the Act, and, second, whether by its very nature, a labor cooperative can ordinarily have no employer-employee relationship as between the cooperative and its worker members. The questions are important not only from the standpoint of the intent of the Act, but also from the standpoint of workers who wish to combine their labor in small businesses and share the income on an equitable basis even though their income may not reach the standards prescribed by the Act.

This particular case involves the question of the means of subsistence of a large number of poor people in Puerto Rico who have attempted to combine in a genuine labor cooperative and who live in an overpopulated country where it is generally acknowledged that unemployment is excessive.

We submit further that the writ be granted on the basis of the record in the case in that the decision of the Circuit Court of Appeals for the First Circuit is contrary to the facts. The trial Court who heard all of the evidence and examined all of the exhibits and who had the opportunity to weigh the intelligence and ability of the various witnesses as well as their veracity, held on the facts that the Cooperative was voluntarily formed and was controlled and operated by the worker members. We submit that it was an error for the Appeal Court to reverse these findings of fact.

The questions raised in this case are of profound social and economic significance to Puerto Rican workers and to the community as a whole. The cooperative system is the only possible form of economic, legal and social organization to meet the situation created in this Island by the Fair Labor Standards Act of Congress in some industries. The needlework industry has been largely closed down in Puerto Rico.

Congress tried, in the summer of 1940, to correct the Puerto Rican situation by an amendment in the law, through which special minimum wages for this Island might be

set below the original rates. The reductions introduced in the minimum wages in the needlework industry Committee, although really substantial, nevertheless have not saved the industry under the employer system, due to the low prices obtainable for their products in a competitive market.

Thus the cooperative organization owned and controlled by the workers themselves, doing away with the salary or wage system, and giving the total net earnings to its members, was the only possible remedy for the maintenance of this handmade needlework industry, which was formerly the second largest industry in the Island.

Opinion of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals for the First Circuit is printed in the record beginning at page 963. The opinion goes entirely upon the facts of the matter and does not decide whether or not the employer-employee relationship exists as between a labor cooperative and its worker members. The Court below holds that the Caribbean Embroidery Cooperative, Inc., is controlled by Mr. Palmer and his wife, who are joint petitioners here with the Cooperative. This is a question of fact. The Circuit Court of Appeals erroneously states in its opinion that the element of credibility is not seriously involved. We believe that the element of credibility is involved throughout the case and that the charter and by-laws of the Cooperative must be taken at their face value and that the testimony of the officers of the Cooperative and the members of the Board of Directors was for the trial Court to evaluate.

Petitioners' Position.

The petitioners' position is that the trial Court was correct in its finding of fact that this is a genuine cooperative voluntarily formed, the object of which was to pool the labor of the members and to distribute the resulting in-

come in proportion to the Cooperative work done by each member; that in such a situation no employer-employee relationship exists or can exist as between the Cooperative and its worker-members; that the Cooperative is wholly controlled and owned by its worker-members and is not subject to the provisions of the Federal Fair Labor Standards Act of 1938.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit commanding that Court to certify and send to this Honorable Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all the proceedings in case numbered and entitled on its docket "No. 3659, October Term 1940, Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff-Appellant vs. Santiago R. Palmer et al., Defendants-Appellees", and that the said decree of the United States Circuit Court of Appeals for the First Circuit may be revised by this Honorable Court and that your petitioners may have such other and further relief as to this Honorable Court may seem just, and your petitioners will ever pray.

JAMES R. BEVERLEY,
RAFAEL SOLTERO PERALTA,
By JAMES R. BEVERLEY,
Attorneys for Petitioners.

I hereby certify that I have examined the foregoing Petition, that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

San Juan, Puerto Rico, January 8, 1942.

JAMES R. BEVERLEY,
Attorney.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The United States District Court for Puerto Rico filed no opinion in the case, but the findings of fact and conclusions of law dated September 19, 1940, are found in the record at pages 30-33. They are not reported. The opinion of November 18, 1941, of the United States Circuit Court of Appeals for the First Circuit will be reported in Volume 123 of the Federal Reporter, Second Series. It is found in the record at pages 958-982, inclusive.

Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 938). The judgment of the Circuit Court of Appeals for the First Circuit was entered November 18, 1941 (R. 982).

Questions Presented.

The questions presented are stated in the petition.

Statutes Involved.

The statutes involved are The Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. A. 201, et seq.). This Act went into effect October 24, 1938. Also involved is Act No. 3 of the Legislature of Puerto Rico, approved May 6, 1920, entitled "An Act for the Incorporation and Organization of Cooperative Systems of Production and Consumption", as amended by Act No. 162 of the Legislature of Puerto Rico, approved May 10, 1938, and by Act No. 16 of the Legislature of Puerto Rico, approved

April 9, 1941. Puerto Rican Act No. 3 of 1920, as amended, is set out in full as Appendix I to this Brief.

ARGUMENT.

Point I.

The Circuit Court of Appeals, First Circuit, was wrong in holding that Santiago R. Palmer and Magdalena J. Palmer, Manager and Assistant Manager respectively of the Caribbean Embroidery Cooperative, Inc., control the business thereof and not the worker-members.

The Circuit Court of Appeals, in a 29-page opinion, holds that the Palmers, or rather, Santiago R. Palmer, controls the Cooperative. The Court admits that "no particular piece of evidence is decisive of the issue of control" (R. 976). It considers numerous details of the business, both as to the formation of the Cooperative, and as to the charter and by-laws which determine the legal structure of the Cooperative. Details as to the operation of the business, as they appear from the minutes of the Board of Directors and of the Executive Committee, are also referred to by the Circuit Court. The most important of these details are considered herewith.

A. *As to the formation of the Cooperative.*—The petitioner Santiago R. Palmer is accused of having participated in the organization of the Cooperative. We submit that there is no reason why he should not have advised and aided his employees in the formation of a cooperative. It is quite clear from his testimony in the record that Palmer knew that he would have to close down his business (R. 745, 776). It is also clear that he understood that the laborers might take over the business and operate it as their own without having any difficulties in regard to the Fair Labor Standards Act. It was only natural that he

should be interested, for he would probably have the chance to lease his buildings and equipment to the Cooperative and avoid a loss in the liquidation of the business. Doubtless he also hoped to be able to secure the position of Manager for the Cooperative since the workers knew that he had experience and valuable contacts in New York which are necessary for this type of business.

Palmer also, in a letter, stated that the Cooperative would be dissolved when it should be no longer necessary for the employers to meet the requirements of the Act (R. 962). Of course, Mr. Palmer could not dissolve the Cooperative. A statement such as that has no probative value and simply expressed a hope. Palmer may also have thought in making this statement that it would influence the laborers toward forming the Cooperative by presenting the situation as if it were temporary and thus to allay any fears of change among workers, most of whom at the outset were quite ignorant of the meaning of cooperative work. The laborers were traditionally accustomed to the employer system, that is, to work for a wage, and to encourage them to undertake a cooperative system of work, it is logical enough to attempt to present it to them as temporary.

The Circuit Court also refers to the fact that when the incorporators were selected the total number of workers inside the plant did not exceed one hundred forty and that the total number of workers represented by the eight incorporators did not exceed two hundred thirty (R. 964). The petitioners have no objection to admitting that in regard to home workers who should have been members of the Cooperative, mistakes were made and that the District Court properly enjoined them in that respect. Certainly all the other workers aside from home workers were adequately represented at all times and the home workers under the Articles of Incorporation and the By-Laws are entitled to membership in the Board of Directors.

According to the law for the formation of cooperatives of consumption and production in Puerto Rico (Appendix I), seven or more persons of legal age can form a cooperative and admit whatsoever number of new members they desire, who meet the requirements set up according to the Charter and By-Laws. In the instant case, a public meeting of all the workers was called in a public theater to discuss the advisability of forming a labor cooperative and at this meeting the whole assembly took steps for the formation of the Cooperative. Approximately two hundred people were present at that meeting (R. 914) and although according to the statutes seven persons could legally take the initiative in incorporating the organization, the full meeting selected incorporators from the different processes of the business. It does not seem that the fact that the home workers were not represented among the incorporators would have any bearing on the question at issue. There was no reason why they should not be represented, but there was no particular reason why they should be, especially considering the general idea which prevailed at that time that home workers were not covered in any event. By the time the Complaint in this case had been filed in Court a great many home workers had been admitted as members of the Cooperative and they had a representative in the Board of Directors.

Another detail which the Circuit Court of Appeals points out (R. 970) is that while Attorney Soltero was working on the Articles of Incorporation and the By-Laws, Palmer described the workings of the Caribbean Embroidery Company to him, although Palmer had not yet been selected by the Cooperative as its Manager. Also that when the Articles of Incorporation were completed, Soltero showed them to Palmer. This statement would seem to suggest that it was wrong on the part of the Attorney who was drawing up the Articles and By-Laws for the laborers to discuss thor-

oughly the nature of the needlework business with the man who knew all of the details of it. We submit that it was both proper and natural, unless the Attorney was also thoroughly familiar with the details, to discuss the structure of the business with the man who knew. The interest of Mr. Palmer in the new organization has always been freely acknowledged, as he expected to salvage something of his business either through leasing his equipment or by being employed as Manager or both.

The Circuit Court states in its opinion (R. 977) that the approval of the Articles of Incorporation and By-Laws by the workers was never secured. According to the Cooperative Law (Appendix I), the Articles of Incorporation need be approved only by the incorporators. Other members admitted to membership subsequently are presumed to have a knowledge of the Articles of Incorporation and of the By-Laws. The evidence shows that great efforts were made to inform as many laborers as possible of the nature of the Cooperative (R. 916, 920) and the Circuit Court disregarded the evidence in the record showing that whenever a member was admitted he had to know in a general way the Articles and By-Laws of the Cooperative (R. 228, 229, Exhibit 12A plaintiff; R. 243 ff., Exhibit 20 plaintiff). Exhibit 12A is a form of application for membership and Article Second in the form of application states that the signers know the Articles of Incorporation and By-Laws and Article 6 states that the applicants are in accord therewith. These applications for membership are taken before a Notary Public. Exhibit 20 of the plaintiff beginning on page 243 of the record was a pamphlet distributed to all worker-members and to all applicants for membership which explained fully the nature of the Cooperative and the working principles of the Caribbean Embroidery Cooperative, Inc. We ask the Court to examine especially the testimony of Juan Enrique Soltero appearing in pages 911-940 of the record. The testimony of

Mr. Soltero on page 924 where reference is made to "this pamphlet", refers to Exhibit 20 of the plaintiff as does the question and answer at the bottom of page 923 of the record. We submit that every reasonable effort was made to educate and encourage the workers in true cooperative work.

The Circuit Court felt that the Articles of Incorporation and the By-Laws were calculated to maintain control in a very small group of workers most naturally inclined to be friendly to Palmer. We submit that this is not according to the record. The original incorporators were freely elected at the assembly of workers which was attended by approximately two hundred. This was the meeting at the "Teatro Sol" referred to both by Mr. Soltero in his testimony and by Mr. Palmer in his testimony (R. 914 ff., 731, 723). In his speech to the workers at that assembly, Soltero asked them to select for incorporators those individuals whom they believed to be the best prepared. The workers acted of their own free will in this selection, and if the incorporators selected by the assembly were friendly to Palmer, that was a tribute to the relations which he had previously maintained with his workers. In any event, under the Articles of Incorporation and the By-Laws, the general assembly of worker-members is the ultimate supreme authority of the Cooperative and no small group could possibly control the Cooperative for any length of time and a majority of the members of the association in each of the processes of the industry had power to remove any director or official (Article 22 of the Charter, R. 51).

We submit in general that it was perfectly logical and proper for certain persons to take the initiative in the formation of the Caribbean Embroidery Cooperative, Inc. and that such is true in the formation of any organization. We submit further that so far as operation and control are concerned, the Articles of Incorporation and the By-Laws lodge no more power in the directors, officers and in the

Manager than would be necessary for the proper functioning of any business. It is especially important for organizations of workers to have efficient management, since from their very nature they are more subject to divisions and similar difficulties.

B. *The Articles and By-Laws of the Cooperative.*—In the record, at pages 973-980, the Circuit Court of Appeals in its opinion refers to the Articles of Incorporation and By-Laws. However, the Court below ignores other provisions of the Charter and the By-Laws which are very important in connection with the question of control. For example, on page 979 of the record the Circuit Court of Appeals points out in Article 245 of the By-Laws that the decision of the Committee on Discipline will not bind the Manager. This is true as a separate statement, but it is only half true in the whole picture, because although the Discipline Committee could not bind the Manager, both the Board of Directors and the general assembly of workers can bind the Manager for the future and reverse decisions of the Manager made in the past (R. 53, 60-67, 91, 130).

In the record, at page 984, the Circuit Court of Appeals states that the Manager of the Cooperative holds the workers in a state of economic subservience because he can disfranchise any member or any number of members at any time by suspending them. This conclusion is contrary to the provisions of the Articles of Incorporation and the By-Laws. Articles 249 *et seq.* (R. 111) provide that in case of infractions of discipline, the Manager may *suspend* a worker *temporarily*, but shall immediately submit the case to the Committee on Discipline. The member who has been subject to disciplinary action by the Manager on recommendation of the Committee of Discipline, may appeal to the Board of Directors and then to the general assembly if he is not satisfied with the decision of the Board of Directors. Article 194 (R. 101) and Article 200 (R. 102) of the By-Laws

provide that the General Manager will be responsible to the Board of Directors for the discipline of the worker-members and may act in representation of the Board of Directors in any matters which the Board might delegate to him. Any worker-member who has been expelled by the Board of Directors has the right to be heard before the general assembly (Article 81 of the By-Laws, R. 82) although such member whose case is on appeal does not have a right to vote on his own case (Article 79, R. 81). The Manager, quite contrary to the opinion of the Court below, cannot act arbitrarily, for sooner or later he has to face the Board of Directors and the general assembly to answer for his conduct. It is true that the Manager can make temporary decisions of moment and, of course, it is conceivable that in the exercise of his power to make such temporary decisions he may commit injustices against members, but it would seem inevitable that ultimately any arbitrary actions would only discredit him before the Board of Directors and the general assembly. Under reasonable principles of business administration, it would seem that the temporary power of the Manager to suspend a member of the Cooperative for disciplinary reasons is amply justified. To hold otherwise would be to hold that one member bent on injuring or breaking up the Cooperative would have the power to seriously disturb the morale and efficiency of the organization until the Board of Directors should meet. A small group under such circumstances could keep the Cooperative in turmoil and seriously affect the business. We earnestly submit that the disciplinary provisions are reasonable, and in any event the general assembly can change them if it sees fit to do so.

The Circuit Court of Appeals (R. 975) says that the earnings of the workers before and after the formation of the Cooperative remained practically the same. The advances provided to the workers by the Cooperative, in advance of the annual liquidation of the business for the year,

were approximately what the members had previously been receiving as wages. However, it should be noted that at the end of the first year the amount available for distribution as dividends to the members in proportion to the hours worked and in accordance with the rules for the division of the income dollar, was $9,803.23 (R. 755), which otherwise and under the employer system, of course, would have gone to the employer. The allotment of the gross-income dollar of the Cooperative is provided for in the By-Laws (Exhibit 2 plaintiff, Articles 305-315, especially Article 314, R. 123, 124, 125). Whether the earnings of the workers were lower or higher under the cooperative system than received previously as wages under the employer system, would depend entirely upon the prices obtained in the continental United States for the products of the Cooperative and the amount of work done. It should be noted that prices under the Cooperative system are much more important than volume, whereas under the employer system volume may be much more important than prices. If the statement of the Circuit Court of Appeals should be correct, it can be attributed only to the economic fact that the ruling prices in New York for work of the type produced by the Cooperative were low. The Cooperative alone could not change those prices. There is no question but what if prices should go up in the future the earnings of the members of the Cooperative would go up correspondingly. In any event, under this cooperative system, the member-workers got all there was in the business. It may have been a good business or a bad business, but good or bad it was the business of these members of the Cooperative. They owned it and through the Executive Committee composed of worker-members and the Board of Directors composed of worker-members, they controlled the acceptance or rejection of orders and the distribution of work and exercised the control which any owner exercises over his business.

C. *Relations with Palmer.*—The Circuit Court in its opinion emphasizes the fact that Palmer, in addition to his contract with the Cooperative as Manager, also had loaned money to the Cooperative for its necessary capital, had leased his equipment to it and had rented his buildings to it. The Court infers from this that Palmer controls the Cooperative. We submit that the lease of the buildings and equipment and the lending of money in this case were normal and natural procedures (R. 892, 893). Efforts had been made to secure a loan from the Puerto Rico Reconstruction Administration, a Federal Government agency, but those efforts failed. It would probably have been absolutely impossible to secure a loan from any other source except Mr. Palmer (R. 777-779). The buildings and machinery formerly used by Palmer were located in the town of San Germán, in or around which most of the workers lived. There is no indication that any other buildings or machinery whatsoever were available to the Cooperative on equal terms or in fact on any terms at all. The valuations of the buildings and equipment for the purposes of the lease contracts were passed upon by a Committee of the workers. *The Cooperative was no more subservient to Palmer nor dominated by him on account of these contracts than is any debtor subservient to or dominated by his creditor.* The relation of debtor and creditor has usually been one in which the creditor exercises some measure of control over the debtor and the only cure for this situation is for the debtor to get out of debt. There is no question but what if this Cooperative should be allowed to operate without molestation by the Government, in time it would accumulate under good management sufficient capital to free itself from its debts and obligations to Palmer or to anyone else. If it did not borrow money from Palmer or had not leased buildings and equipment from Palmer, it would have had to lease buildings and equipments and borrow money from some other person, in which case it

would have stood in relation to this other person the same as it stands with Palmer and doubtless the Government would then have alleged that it was "controlled" by the other creditor. It is true that the Management Contract is tied in with the other contracts, but this is a question of independent bargaining between the Board of Directors and the Cooperative on the one hand and Palmer on the other. Palmer may very well have hoped that if he could not continue as Manager of this Cooperative he might lease his services and equipment to others. In any event, when the Cooperative shall have accumulated enough capital to free itself of debt and to stand on its own feet without borrowing money or leasing equipment, it will certainly be completely free of any so-called "control". The vice of the Government position throughout in this case has been that it expected a Cooperative organization of extremely poor people to spring full-fledged, like Pallas Atheme from the brow of Zeus, into an organization with independent capital in place of working up to an independent position through time, labor and growth. Certainly the premises offered the Cooperative by Palmer were the only ones available at the time. Whether the Cooperative in the future can make other and more advantageous arrangements is a question the answer to which cannot be predicted as yet. The various contracts with Palmer were freely entered into and although the need to work and earn a living may be alleged as a force or motive actuating the workers to accept the conditions of the contracts, the same forces would operate in regard to any other person or entity.

On the whole record there certainly can be little if any criticism of the various contracts. If the Cooperative is allowed to continue to function it will in a more or less short time work itself out of any subservience to its creditor.

Regarding Palmer's income before and after the forma-

tion of the Cooperative, the court below incurs in the same confusion as did the plaintiff, that is, a comparison is made between the *net* profits of Palmer prior to the formation of the Cooperative and the *gross* receipts thereafter. Any comparison of net in one year with gross in another is of no value. From the total gross receipts of Palmer from the Cooperative contracts would have to be deducted the following items before net could be reached for a comparative basis:

1. Depreciation on his buildings.

2. Depreciation on the equipment which he leased to the Cooperative.

3. Repairs to the buildings and replacement and repairs of equipment.

4. Purchase of additional equipment as needed by the Cooperative.

5. Traveling expenses on the business of the Cooperative.

6. Traveling expenses of other persons whom he might use in the administration or management of the Cooperative business.

7. Compensation to the Assistant Manager or any other permanent or temporary employee necessary in the management.

8. Taxes on buildings and equipment.

9. Insurance on buildings and equipment.

The balance would go to pay him for his services as Manager of the Cooperative and, of course, the Cooperative was also buying in Palmer's salary his valuable commercial contacts in the States. See Clause 15 of the contract between Palmer and the Caribbean Embroidery Cooperative, Inc., at page 284 of the Record. If the Board of Directors of the Cooperative preferred to put all of the management

expenses in this form, it is difficult to see why they should be criticized for doing so. The record does not show the specific cost of these different items to Palmer which would reduce his gross income to a figure comparable to his previous net income, but any reasonable consideration of the matter will show that the total of these expenses must have been considerable. At any rate, Palmer's net income as Manager of the Cooperative must have been considerably less than his net income in 1937, when he was an independent enterpriser. Probably a reasonable figure for his net income for the first year of the Cooperative would be around $6,000 or $7,000 and it could hardly be alleged that a salary of $7,000 as Manager of the Cooperative was excessive. Had the old employer-employee system prevailed, Palmer would have certainly received, in addition to this $7,000 net income of his salary, the $9,803.21 surplus of the Cooperative (R. 507).

Point II.

There exists no employer-employee relationship within the meaning of the Federal Fair Labor Standards Act of 1938 between the Cooperative and its worker-members.

In fact a statute such as the Federal Fair Labor Standards Act of 1938 *could not* apply to a labor cooperative such as the Caribbean Embroidery Cooperative, Inc., for the very practical reason that a person could not be made to pay himself more than he had. If it should be held that the members of the Caribbean Embroidery Cooperative, Inc., are employees of themselves or that the Cooperative as a separate entity is an employer of its member-workers, then it is clear that the member-workers would have a cause of action against themselves in the Cooperative for the difference between what they received for their work and the minimum set by the Federal Act. In order to pay

such a judgment the very member who had the judgment would have to raise the funds to pay it unless it could be paid from the reserves of the Cooperative provided for in Articles 313-317 (R. 124, 125) of the By-Laws of the Cooperative, which is also his own money. In other words, if the reserve set up by the Cooperative were sufficient to pay such a judgment, it could be paid out of such reserves which already belonged to the same persons. If the reserves were not sufficient, the judgment could not be paid unless the member-workers of the Cooperative raised the money among themselves to pay themselves. In this connection it must not be overlooked that if the supposition be adopted that the Caribbean Embroidery Cooperative, Inc., is an employer, then the same relation between the payments to the different processes in the work will in all probability have to be maintained because of the contract among the workers themselves acting through the Board of Directors, that is to say, the division of the dollar among the processes. The Federal Fair Labor Standards Act fixes minimum wages, but not maximum wages, and Section 18 provides in part:

> "No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act or justify any employer in increasing hours of employment. * * *"

If we examine Articles 314, 315, 316, 317 and 328 of the By-Laws of the Cooperative beginning on page 124 of the Record, we see that if, for example, the workers of the Caribbean Embroidery Cooperative, Inc., had a total claim against themselves as owners of the Cooperative, and if the reserve of the Cooperative established by the law or by its own regulations were insufficient to pay its claims, the money would have to be raised by a contribution from

each worker himself in proportion to the cooperative work done by him. This would then be distributed in accordance with Article 317 of the By-Laws, that is, in proportion to the cooperative work realized by each member and the result would be that each member with a claim against the Cooperative had paid himself.

Regarding the status of cooperatives in general under the Federal Fair Labor Standards Act, the Wage and Hour Division of the Department of Labor itself gave out a press release or interpretation which appears at pages 159 and 160 of the record. Due to the fact that there exists an infinite variety of cooperatives, the decision or interpretation by the Wage and Hour Division is not conclusive as to all cooperatives. In other words, of course, a cooperative *may be* an employer just as any other employer in which case the Act would apply, but it is significant that the Wage and Hour Division recognized that there may be worker-cooperatives in which the interests of the members as workers are in all cases the same as their interest as proprietors. This is exactly the case of the Caribbean Embroidery Cooperative, Inc. We quote herewith the pertinent paragraph from that official release.

> "Any doubt which exists must be based on the notion that cooperatives are, in effect, partnerships and that no employer-employee relationship exists between them and the members who work for them. *Although it is possible that there may be 'workers' cooperatives in which the interests of the members as workers are in all respects the same as their interests as proprietors and in which the usual characteristics of the employer-employee relationship do not exist, and hence in which the worker-members would not be employees within the meaning of the Act*, it is to be noted that cooperatives are commonly separate entities in which the usual characteristics of the employer-employee relationship exist as between them and worker-members. Cooperatives

> are generally in the corporate form with interests distinct from those of their members. Though their workers may be stockholders, as workers they are subject to the usual control and discipline of the corporate employer; they work at the discretion of the cooperative's board of directors or other managerial body. Their concern, as workers, with wages, hours of work and other working conditions, is quite distinct from and may be much greater than their interest, as stockholders, in profits or dividends." (Italics supplied.)

So far as this Cooperative is concerned, it is evident, as was found by the Court below, that the interest of each worker-member as a worker is identical with his interest as a proprietor.

In order for the Federal Fair Labor Standards Act to apply, there must exist the relation of employer and employee between the parties. Section 3(d) of the Act reads as follows:

> "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States or any state or political division of a state, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

The relation of master and servant is, of course, quite old and well known to the law. One of the most essential tests in determining the relation of master and servant is the power of hiring and discharging and another important element in the relation is the control of the master over the employment, and the details thereof, of the servant.

> "The words 'employer' and 'employee' are doubtless the outgrowth of the old terms 'master' and 'servant', and have been adopted by reason of, and in deference to, the exalted position that labor has acquired by the

education of the masses. The relation, whatever term may be used to describe it, exists, it ordinarily is said, whenever one person stands in such a relation to another that he may control the work of the latter and direct the manner in which it shall be done. (Boswell *v.* Laird, 8 Cal. 469, 68 Am. Dec. 345; Sickles *v.* Mather, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521; McColligan *v.* Pennsylvania R. Co., 214 Pa. St. 229, 63 Atl. 792, 112 A. S. R. 739, 6 L. R. A. (N. S.) 544; Hand *v.* Cole, 88 Tenn. 400, 12 S. W. 922, 7 L. R. A. 96) (18 R. C. L. 493)."

"The essential elements are that the master shall have control and direction not only of the employment to which the contract relates, but of all of its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist. (Baltimore Boot, etc., Co. *v.* Jamar, 93 Md. 404, 49 Atl. 847, 86 A. S. R. 428; and all other cases cited in the preceding paragraph) (18 R. C. L. 493)."

"The most universal and unfailing test in determining the relation of master and servant is the power to discharge. It has been decided and this court has stated the rule to be that the relation of master and servant does not exist unless it includes the right to discharge. (Densby *v.* Bastlett, 318 Ill. 616, 149 N. E. 591; 42 A. L. R. 1411; Foster *v.* Wadsworth-Howland Co., 168 Ill. 514, 48 N. E. 163; Pioneer Fireproof Constr. Co. *v.* Hansen, 176 Ill. 100, 52 N. E. 17; Harding *v.* St. Louis Nat. Stock Yards, 242 Ill. 444, 90 N. E. 205; Connolly *v.* People's Gaslight & Coke Co., 260 Ill. 162, 102 N. E. 1057)."

"The right to control the work, not only the result of the work, but also the means and manner of its performance, reserved to or possible of exercise in the employer, establishes and maintains the relation of master and servant and negatives that of proprietor and independent contractor. (See 14 R. C. L. 67; 3 R. C. L. Supp. 164; 4 R. C. L. Supp. 869; 5 R. C. L. Supp. 738) (Dobson *v.* Portland Sebago Ice Co., 124 Me. 305, 128 Atl. 401, 42 A. L. R. 604; Messmer *v.* Bell & C. Co., 133 Ky. 19, 117 S. W. 346, 19 Ann. Cass. 1)."

In 39 C. J. 33 ff., the relation of master and servant is stated several times with conciseness.

"Sec. 1. A. Definitions. The relation of master and servant is that which arises out of a contract of employment, express or implied, between a master or employer upon the one hand and a servant or employee upon the other hand.

"Master. He is deemed to be a master who has the superior choice, control, and direction of the servant, and whose will the servant represents not merely in the ultimate result of the work, but in the details."

"Sec. 2. B. Creation and Existence of Relation.—1. Essentials of Relation.—a. In General. The relation of master and servant arises out of contract; the assent of both parties is essential; hence the relation does not arise between employees and one who has made advances to, or guaranteed the accounts of, the business in which they are employed, or even one who has agreed with the owner to pay the salaries of employees."

"Sec. 4. c. Direction and Control.—(1) In General. The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done. Inasmuch as the right to control involves the power to discharge, the existence of the power to discharge is essential, and is an indicium of the relationship. A mere authority to direct the course of a third person's servant is not inconsistent with his remaining the servant of such third person, and the mere reservation of the right to discharge or inspect the work of employees of another will not create the relation when it did not otherwise exist."

"Sec. 8. 2. Independent Contractors and Their Employees. An independent contractor is not a servant of his employer. The relation of master and servant does not exist between an employer and the servants of

an independent contractor, nor between an independent contractor and the servant of a subcontractor, and he is not responsible as master, either to or for them."

In considering the situation in the Caribbean Embroidery Cooperative, Inc., we find that not a single one of the elements which go to make up the relation of master and servant are present as between the worker-members of the Cooperative and themselves as owners of the Cooperative.

(a) The laborers control all the terms of their own work.

(b) They receive calculated advances to live on and the surplus is divided at the end of the year.

(c) The laborers control absolutely the acceptance or rejection of orders. They may decide not to accept any orders at all for as long as they wish. They may reject some where prices are too low (as was actually done) or they may accept those with low prices in conformity with market conditions.

(d) The surplus at the end of the year is distributed on the basis of the *work done*, not on the basis of stock ownership.

(e) Work goes only to members.

(f) The laborers control absolutely the admission of new members and the expulsion of old members. In case of expulsion by the Board of Directors, an appeal lies to the general assembly of all members.

(g) As to members who have not paid up to 25% of their share of stock or $2.50, while they have no vote in the assembly, they take part in discussions and have a vote in the process groups in nominating members of the Board of Directors.

There are, of course, as mentioned above, a great many types of cooperatives and it would be impossible to state

generally that every cooperative is not an employer. Each cooperative so far as the employer-employee relationship is concerned, would have to be examined separately to ascertain the facts.

A cooperative system has been defined in 13 Corpus Juris 932 as follows:

> "A union of individuals, commonly laborers or small capitalists, formed for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital labor contributed by each member."

Compare *Finnegan* v. *Knights of Labor Building Assn.*, 18 L. R. A. 778.

Were it not for statutory permission to incorporate specially, this Cooperative would be an "Association" (5 C. J. 1330) or Union or Partnership.

In 18 C. J. S., p. 127 is a quotation from another case defining co-operatives:

> "The words 'cooperative, company, corporation, or association' are defined to mean a company, corporation, or association which authorizes the distribution of its earnings in part, or wholly, on the basis of, or in proportion to, the amount of property bought from or sold to members, or to members and to other customers, *or of labor performed or other services rendered to the corporation.*" Chaffee *v.* Farmers' Cooperative Elevator Co., 168 N. W. 616, 617, 39 N. D. 585."

Looking at the human side of this question, one would think that under conditions prevailing in Puerto Rico with its overcrowded population and chronic unemployment, the Government would encourage labor cooperatives, not only because such cooperatives would furnish some living for the workers, but also because in the long run labor cooperatives should increase the dignity and moral stature of the

members. In the present case we find these workers forming the Caribbean Embroidery Cooperative, Inc., to do the only work they know how to do and in order to live, even if poorly. They do not know any magic formula by which they can live without working. They band together and very wisely select the most competent man they know to employ as their Manager. It is true that some of the worker-members are somewhat ignorant, but that certainly does not affect the nature of the Cooperative and the uncontradicted testimony in the Record shows that they are educating themselves rather rapidly. The testimony produced by the Government itself demonstrates this and also demonstrates that the Cooperative is a genuine labor cooperative which as a matter of law could not possibly be included within the terms of a statute designed to apply to employers and employees.

Point III.

The Caribbean Embroidery Cooperative, Inc., is a "labor organization" within the meaning of Section 3(d) of the Fair Labor Standards Act of 1938 and as such is exempt from the provisions of the Act.

A perusal of the Fair Labor Standards Act with special reference to Section 2(b) which is a part of the "Finding and Declaration Policy", shows that Congress very carefully considered the effect of the Act on different types of industries. In general a standard type of wage was fixed as a minimum. We might say that this was designed for the normal type of industry, where neither very high wages had been paid nor very low wages. But Congress recognized that in many industries, the normal type of minimum would be entirely too low. Consequently Section 5(e) of the law provided for Industry Committees which would have the power to examine into the situation of

industries able to pay better than the standard minimum and power was given these committees to fix minimum wages in certain cases which would be above the minimum established by the law as a general standard.

Equally Congress was concerned that the law should not reduce employment and earning power both. This might happen in some substandard industries until such industries could adjust themselves. This is a fair inference from the provisions of Section 2(b) taken with the provisions of Section 3(d). Section 2(b) reads as follows:

> "It is hereby declared to be the policy of this Act through the exercise by Congress of its power to regulate commerce among the several states, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

And the pertinent part of Section 3(d) reads:

> "'Employer' * * * shall not include * * * any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

A labor cooperative is a "labor organization" and it is fair to infer that Congress had in mind labor cooperative in enacting Section 3(d) and Section 2(b). If Congress had meant "labor union", there is no reason why it should not have said "labor union". It is significant that the words used were "labor organization", which is broader. Further if Congress had meant "labor union", the exemption would have been practically meaningless, since unions, as a usual thing do not engage in production of articles for commerce as a union. To give any sense to the exemption of "labor organization", we have to turn to some such organization such as this Cooperative here in-

volved, which is both a "labor organization" and also engaged in the production of goods for commerce.

The reference in Section 2(b) "without substantially curtailing employment or earning power" must be given some meaning. Doubtless it was considered that the minimum wage in some industries or branches of industry might curtail employment to some extent, but this would be made up in the general social scheme from increased earning power. But certainly Congress could not have intended the law to destroy totally any industry (as actually happened in the needlework industry in Puerto Rico). Under the exemption of "labor organizations" it is logical that Congress may have had in mind that labor organizations on the cooperative basis could do something at least for themselves during an adjustment period. It would not be strange that the government should encourage cooperatives. The Farm Credit Administration is specifically directed to encourage cooperative marketing (12 U. S. Code 1141 c.) and their receipts are or have been exempt from income tax (26 U. S. Code 103). Labor cooperatives organized for pooling of labor and division of the product are certainly as worthy of encouragement as are marketing cooperatives—perhaps from the social standpoint, more so.

Conclusion.

The welfare and livelihood of thousands of workmen depend upon the decision in this case. We submit that this Court should issue certiorari in this case not only for the above reason, but also because the very important question is involved as to the application of the Act to labor cooperatives of the nature of the Caribbean Embroidery Cooperative, Inc. We submit that the court below erred in reversing the trial court on the facts of the case alone and that even if it should be found that some sort of tenuous

control on the part of Palmer exists in regard to the Co-operative, it is only such "control" as any Manager must necessarily exercise and would not affect the legal questions involved. We submit further that the decree of the Circuit Court of Appeals for the First Circuit should be reversed.

San Juan, Puerto Rico, January 8, 1942.

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APPENDIX I.

An Act for the Incorporation and Regulation of Cooperative Associations of Production and Consumption.

BE IT ENACTED BY THE LEGISLATURE OF PORTO RICO:

Section 1 (as amended in 1941). Any number of persons, not less than seven, residing in Puerto Rico, may organize a cooperative association, society, union, company, or exchange, for the purpose of engaging in commerce, agriculture, dairying, mining, manufactures, mechanic industries, on the cooperative plan, through a certificate of incorporation made in the form hereinafter mentioned.

Any cooperative organized in accordance with this Act may limit its activities to its members exclusively. When such limitation is prescribed, the board of directors of the cooperative may authorize activities, business deals, or other kind of relations with non-associated persons, but in such case the total volume of such activities, business deals, or relations shall not exceed in any fiscal year the total volume of activities, business deals, or relations of the cooperative with the members thereof during the same period.

For the purposes of this Act, the words 'association', 'company', 'corporation', 'exchange', 'society' or 'union' shall have the same meaning.

Section 2. The certificate containing the clauses or articles of incorporation, shall set forth—

1. The name of the association, which shall have as a distinctive part thereof the word "cooperative", but no association of this class shall choose a name which has already been adopted by another corporation or which is so similar thereto as to cause confusion.

2. The municipality or municipalities of Porto Rico in which the association is to transact its business, and the city or town of the Island in which its principal office is to be established.

3. The object for which the association is organized.

4. The total amount of the authorized capital stock of the association, the number of shares into which it is divided, the par value of each share, the manner in which deferred payments on shares shall be made, and the number of shares subscribed at the time of incorporation.

5. The conditions for the admission of members.

6. The manner in which the profits are to be applied; and

7. The names and residences of the incorporators.

Section 3. The original articles of incorporation of any association organized pursuant to this Act, shall be signed by all the incorporators and acknowledged by each of them before a notary public, after which it shall be submitted for filing at the office of the Executive Secretary of Porto Rico. The said official shall examine the said document, and if it is found to comply with all the requisites of this Act and none of its provisions is in conflict with existing laws, he shall issue a certificate of registration certifying to the date on which the said articles of incorporation were filed and accepted by him. This certificate shall be sufficient proof of the legal existence of the association or body politic effective the date of its issue, and from that moment it shall be considered as such and shall possess all the appropriate powers of a corporation or body politic.

Section 4 (as amended by Act 162 approved May 10, 1938). Every cooperative association shall be administered by a board of directors, composed of the number of directors provided by regulations, which shall be at least five. The directors shall be elected annually by the stockholders, from among their number, except in the cases of public directors when provision is made therefor, at the time, in the manner, and for the term provided by the regulations of the association, and they shall discharge their duties for the time for which they may be elected and until their successors shall have been elected and have qualified. The by-laws may also provide that one or more directors, who shall not be more than one-fifth of the total number of directors, may be appointed by any public officer or commission. The director

or directors so appointed shall not have to be members or stockholders of the association, but they shall have the same powers and rights as to the other directors. Said directors shall chiefly represent in said associations the public interest in general; Provided, That when one of the cooperative associations authorized by this Act desires financial cooperation on the part of the Government of Puerto Rico, the said cooperative shall insert in its regulations a provision authorizing the Governor of Puerto Rico to appoint the public directors herein authorized. A majority of the stockholders shall have power, at any regular or special meeting, legally called, to remove any director or official from office and to fill such vacancy, and from that moment a director or official thus removed shall cease in the discharge of his office.

The officers of all associations of this class shall be a president, one or more vice-presidents, a secretary and a treasurer, who shall be elected annually by the directors from among their number, unless the regulations provide that they may also be elected from among the stockholders.

The office of secretary and treasurer may be discharged by one sole person, in which case the person so named shall be the secretary-treasurer of the association. The treasurer or secretary-treasurer shall give bond in such amount and form as prescribed by the regulations.

The association may name the officers, agents and factors who may be necessary, as prescribed by the regulations.

Section 5. The first meeting of the association shall be called by a notice subscribed by a majority of the incorporators.

The said notice shall designate the place, hour and purpose of the meeting and shall be served personally upon all the incorporators, or published in a newspaper of general circulation in Porto Rico if personal service cannot be made; and at this meeting a majority of the incorporators shall constitute a quorum for the transaction of business of the association and shall have authority to elect the directors and officials referred to in Section 4 of this Act, who shall hold office until their successors shall have been appointed and qualified. At this meeting the regulations

for the government of the internal affairs of the society shall also be adopted.

Section 6 (as amended by Act 162 approved May 10, 1938). The regulations of the association shall make the necessary provisions for—

1. The holding of an annual meeting at least, of the stockholders, and such other regular and special meetings as may be deemed convenient, and the number of stockholders necessary to constitute a quorum for the transaction of business.

2. The election of the directors and officers, and the designation of agents and factors, and their respective powers and duties.

3. The determination of whether the shares of stock or any part thereof, are transferable, and in case it be decided that they are transferable, the manner of their transfer and registration; and in case it is decided that they are not transferable, the manner in which payment shall be made to the stockholders of the balance due them when they cease to form a part of the association.

4. The manner and form in which the stockholders may withdraw from the association.

5. The form and the amount of the bond to be given by the treasurer, as well as by any other officer or agent who shall give bond for a faithful compliance with his duties.

6. The inspection and examination of the accounts.

7. The custody of the seal of the association, which shall bear the name thereof.

8. The manner in which the receipts of the association shall be distributed.

9. Such other matters as may be deemed convenient for the best interests of the corporation.

Section 7. The association may amend its articles of incorporation by a majority of the votes of its stockholders at any regular meeting of the shareholders, or at any

special meeting called for that purpose with ten days' advance notice to all the stockholders, but in no case shall the authorized capital of an association of this class be decreased to a sum less than the capital paid in at the time of the adoption of the amendment. No amendment to the articles of incorporation shall take effect until it shall have been filed and registered in the office of the Executive Secretary of Porto Rico, which shall be done by a certificate signed by the president and the secretary of the association, and duly sworn to before a notary public, setting forth therein all the proceedings had in the adoption of the amendment or amendments. When the Executive Secretary is convinced that all the legal requirements have been complied with, he shall issue a certificate setting forth the filing and registration of the said amendments, and from that moment the articles of incorporation shall be held to be amended.

Section 8. Every association organized in accordance with this Act, shall have power to purchase, sell and negotiate the products of any other cooperative association, theretofore organized or organized subsequently thereto pursuant to the provisions of this Act and engaged in the same line of business.

Section 9 (as amended by Act 162 approved May 10, 1938). No stockholder in associations of this class shall possess shares representing a face value of more than one thousand dollars except as hereinafter provided, nor be entitled to more than one vote. Any association may limit in its by-laws the number of shares of common stock which a member may own. No vote by proxy shall be admitted at any meeting, unless otherwise provided in the by-laws of any association.

Section 10. At any regular meeting, or at any special meeting duly called, at which may be present a majority of all stockholders, an association organized pursuant to this Act may, by a majority of the votes present, subscribe to stock and make investments of the reserve fund in the authorized capital of any other cooperative association, provided that the funds so invested shall not exceed twenty-five (25) per cent of its paid-in capital.

Section 11. Where an association organized pursuant to this Act shall purchase the business of another association, person or persons, it may pay for the value thereof, in whole or in part, with shares issued by it of its capital stock, to the selling association or person, in an amount the par value of which shall be equal to the market value of the business purchased, and in such case the transfer to the association of such business shall be equivalent to the payment in cash for the shares so issued of the authorized capital stock.

Section 12. In case that the cash value of the business purchased exceed one thousand (1,000) dollars, the directors of the association are authorized to retain the shares in excess of one thousand (1,000) dollars, as depositaries for the vendor and until said vendor shall have transferred the same to other persons. No certificate of stock shall be issued to any subscriber until the par value of each share shall have been paid in full; but subscribers may be granted the privilege of voting as stockholders under the regulations of the association, provided they shall have paid in cash a part of the shares subscribed by them.

Section 13. Subject to revision by the corporation at any regular or special meeting, the directors shall, at least once every twelve months, divide the profits, paying a dividend on the capital paid in which dividend shall not exceed six per cent per annum, after deducting and setting apart at least ten per cent of the net profits for the reserve fund, until accumulating in such reserve fund an amount equal to thirty per cent of the paid-in capital stock, and up to five per cent of the net profits, if so decided, for purposes of education, which shall be used for teaching the cooperative system through meetings and lectures throughout the Island, in such manner as may be decided upon by the committee appointed for such purpose by the board of directors. The remaining portion of the net profits shall be apportioned by the Board of Directors in the form of a dividend among the stockholders and employees, in proportion to the amount of the purchases made or products delivered by the former, according to whether it be a consuming or producing corporation, and of the wages and

salaries received by the latter, subject to revision by the corporation, as hereinabove provided.

Section 14 (as amended by Act 162 approved May 10, 1938). Any association organized pursuant to this Act may voluntarily dissolve by a vote of at least two-thirds of its shareholders, through the procedure provided under Section 26 of the Corporation Law in force.

Section 15. Every association organized in accordance with this Act, shall file with the Executive Secretary of Porto Rico on or before the fifteenth day of March of each year, a report stating the name of the association, the location of its principal business office, the total amount of business transacted during the preceding calendar year, the amount of the capital stock subscribed and paid in, the number of stockholders and the number of shares held by each, the total expenses of its operations, the amount of its assets and of its debts and liabilities, and its profits or losses.

This report shall be signed under oath by the president and treasurer of the association, and the penalties prescribed by Section 25 of the Corporation Law in force, shall be applicable to associations organized under this Act in case of failure to file their annual report within the term fixed, or to amend said report if it be filed in an incomplete or unsatisfactory manner, or when they fail to transmit to the Treasurer of Porto Rico the duplicate of said report hereafter referred to.

A copy of the said report shall be sent to the Treasurer of Porto Rico who, if he have reason to doubt the correctness of same, or on petition signed by five stockholders of the association, shall order an investigation of the books and business thereof, and shall submit to the stockholders a report of the result of the investigation. Any director or official who makes or signs a false annual report of the conditions of the association, shall be fined two hundred (200) dollars for the benefit of The People of Porto Rico, which shall be enforced with costs through an action brought by the Attorney General at the request of the Treasurer of Porto Rico.

Section 16. Any stockholders or other person who may have an interest in the business of an association of this class may inspect its books in the main office, at reasonable hours and when the business of the association will not be inconvenienced or interrupted.

Section 17. Every cooperative association, corporation or company which may have been organized in Porto Rico and has been transacting business prior to the approval of this Act may be reorganized in accordance with the provisions of this Act. In such case the new association shall retain all the rights and obligations acquired by the old association, including the ownership and possession of the latter's real and personal property, in the same manner and scope which it had, and subject to all the indebtedness and liabilities of the old association.

Section 18 (as amended by Act 162 approved May 10, 1938). No association or corporation organized subsequent to the approval of this Act or of Act No. 70, approved August 4, 1925, as amended, shall have the right to use the term "cooperative" as a part of its corporate name or title, unless it shall have complied with all the provisions of this Act, and every association or corporation violating the provisions of this section shall be prohibited from transacting business with the use of the word "cooperative" in its name, by any court of competent jurisdiction, on the petition of any stockholder of any other association legally organized in accordance with this Act or with the aforesaid Act No. 70 of 1925.

Section 19. The Executive Secretary of Porto Rico shall charge and collect, for the benefit of The People of Porto Rico, in internal revenue stamps, the following fees for the filing in his office of any certificate or document relative to cooperative associations referred to in this Act:

1. For receiving, filing and registering the articles of incorporation, or amendments thereto $10.00
2. For issuing certificates of registration as a body politic 2.00
3. For filing certificates of agreements for dissolution 2.00

4. For issuing certificates of dissolution 2.00

5. For issuing a copy of any document or paper which has been filed, relative to associations of this class, 10 cents for each 100 words ....

6. For certifying the copy above mentioned and affixing thereto the seal of the Island 1.00

Section 20. The provisions of the Private Corporation Law shall be supplementarily applicable where not in conflict with the letter and spirit of this Act.

Section 21. That all laws or parts of laws in conflict with this Act are hereby repealed.

Section 22. That this Act shall take effect ninety days after its approval.

Approved May 6, 1920.

APPENDIX II.

Pertinent Parts of Federal Fair Labor Standards Act of 1938.

(29 U. S. C. A. 201 et seq.)

Section 2(b). It is hereby declared to be the policy of this chapter, through the exercise by Congress of its powers to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676, Sec. 2, 52 Stat. 1060.

Section 3(d). "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or

anyone acting in the capacity of officer or agent of such labor organization.

Section 6. Minimum wages; effective date.

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 208, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 208.

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in

Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this chapter.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 205(e). June 25, 1938, c. 676, Sec. 6, 52 Stat. 1062, as amended June 26, 1940, c. 432, Sec. 3(e), (f), 54 Stat. 616.

Section 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 215. June 25, 1938, c. 676, Sec. 17, 52 Stat. 1069.

Section 18. Relation to other laws.

No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher

than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter. June 25, 1938, c. 676, Sec. 18, 52 Stat. 1069.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 940

CARIBBEAN EMBROIDERY COOPERATIVE, INC., SANTIAGO R. PALMER, AND MAGDALENA J. PALMER, PETITIONERS

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. Its "Findings of Fact and Conclusions of Law" appear in the record (R. 30–33). The opinion of the Circuit Court of Appeals (R. 958–982) is reported in 123 F. (2d) 749.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 982) was entered on November 18, 1941. The

petition for writ of certiorari was filed on February 11, 1942. The jurisdiction of the Court is invoked under section 240 (a) of the Judicial Code, as amended.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, hereinafter referred to as the "Act," are set forth in the appendix.

QUESTIONS PRESENTED

1. Whether the trial court's decision that the petitioner, Caribbean Embroidery Cooperative, Inc., was a bona fide cooperative, controlled and owned by the worker-members who were self-employers, was properly set aside as against the weight of the evidence; this question involves also the related findings that the petitioners, Santiago and Magdalena Palmer, did not control the cooperative and were not the employers of the "worker-members."

2. Further questions urged by the petitioners, but which we think are not involved, are whether the cooperative is a "labor organization" excluded from the definition of "employer" by section 3 (d) of the Act; and whether the wage and hour provisions of the Act apply to the workers of a bona fide cooperative which they own and control as members and stockholders.

STATEMENT

On April 20, 1940, the Administrator of the Wage and Hour Division filed a complaint in the District Court of the United States for Puerto Rico pursuant to section 17 of the Act to restrain Santiago R. Palmer, Magdalena Palmer, and Caribbean Embroidery Cooperative, Inc., from violating sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Act (R. 2–11). Defendants were alleged to have employed plant workers and home workers in the production of goods for interstate commerce at less than the minimum wages, and to have exceeded the maximum weekly hours of employment without payment of time and one-half for overtime. The complaint also alleged that the goods so produced were shipped in interstate commerce. There were, moreover, allegations that records were not kept as required by the Act and regulations. The main issue raised by defendants' answer (R. 25–27) was that no employer-employee relationship existed between the workers and the defendants.[1] Defendants contended that the worker-members were the sole owners of the Caribbean Embroidery Cooperative, Inc., and, accordingly, self-employers, that Mr. and Mrs. Palmer were "employees or agents"

[1] The defendants also contended that the cooperative was a "labor organization" under section 3 (d) of the Act and exempt as such (R. 26). The District Court failed to pass on this contention. The Circuit Court of Appeals held that the cooperation did not come within the exception in section 3 (d) (R. 981).

of the members, and that, accordingly, neither the Cooperative nor the Palmers was an "employer" within the meaning of section 3 (d) of the Act. The underpayments and other alleged violations were admitted by stipulation (R. 27–29.)

The District Court after trial denied the injunction and dismissed the complaint[2] (R. 33–34). The court found that the defendant cooperative "was organized in good faith and is a genuine cooperative," and concluded that the individual defendants "neither jointly nor separately own nor control" the cooperative (R. 31), and that none of the defendants was an employer of the "worker-members" of the cooperative (R. 31).

The Circuit Court of Appeals reversed the District Court's judgment and directed that an injunction issue against the three petitioners (R. 981). That court held that the "member-workers" were employees of the Palmers and the "cooperative," and entitled to the benefits of the Act. The Circuit Court of Appeals upon "a close examination of the record" was "led * * * irresistibly to the conclusion" that the trial court's finding that the workers and not the Palmers controlled the business was "against the clear weight of the evidence

[2] The court, however, found that relatives of the members "worked on goods of the * * * Cooperative with [its] * * * consent" and were "employees of the said cooperative within the meaning of the Act" (R. 33). The District Court, accordingly, enjoined the continued employment of such non-members in violation of the Act's wage and hour standards (R. 34).

and must be set aside" (R. 975–976). It recognized that findings of fact are not to be upset lightly (R. 960, 975). Reliance was placed, therefore, principally upon an examination of "documentary evidence," "testimony on which there is no conflict, and for the most part only the testimony of Palmer and Soltero [one of the petitioners and petitioners' attorney], so that the element of credibility will not be seriously involved" (R. 960). The court's opinion summarizes this evidence at considerable length.[3]

Since about 1931, Santiago Palmer and his wife, Magdalena Palmer, owned and operated the Caribbean Embroidery Company in San German, Puerto Rico (R. 710). They were engaged as contractors in the manufacture of needlework products for customers in the United States. Business was solicited through J. A. Garcia, a New York agent (R. 223, 224). Raw materials belonging to the company's customers were shipped to the San German plant, where they were cut to specifications and distributed through agents to women needleworkers on the Island who sewed and embroidered the handkerchiefs and other products in their homes.

[3] The Administrator also contended in both courts below that even were the corporation a genuine cooperative controlled by the workers, it would nonetheless be an "employer" within the meaning of the Fair Labor Standards Act. The Circuit Court of Appeals found it unnecessary to pass upon this question in view of its decision that the Palmers controlled the cooperative and were, therefore, the employers (R. 981–982).

The completed work was collected by the company's distributors, returned to its plant and, after laundering, ironing, and packing, was shipped back to the mainland (R. 3, 27).

The Fair Labor Standards Act was approved by the President on June 25, 1938, to become effective October 24, 1938. During the first year, a minimum hourly wage of twenty-five (25) cents was established, which thereafter became 30 cents.[4] Twenty-five cents an hour was substantially in excess of the earnings of the Palmer's employees (R. 28, 756–757, 820, 868, 870) or, indeed, of any of the needleworkers in Puerto Rico.

About the time of the passage of the Act, Juan Soltero, an attorney and accountant in Puerto Rico, made a study of the provisions of the new law (R. 911–912), and became convinced that the Puerto Rico needlework industry could not operate at the wage rates required by the law (R. 912), but that if organized into cooperative associations the Act would be inapplicable. He discussed his plan of "cooperativism" with some employers in the industry (R. 925–927) and shortly thereafter supervised the reorganization of the needlework business of one Castillo into a cooperative (R. 925–931).

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[4] By Act of June 26, 1940, c. 432, 54 Stat. 616, sec. 6 of the Fair Labor Standards Act was amended to provide for the establishment of special minimum rates for Puerto Rico. Pursuant to this amendment the Administrator issued a wage order, effective December 2, 1940, providing for a minimum hourly wage of 12½ cents for employees engaged in the processing of handkerchiefs in the home, and 20 cents for operations in the plant.

In June of 1938, Soltero discussed with petitioner Santiago Palmer the possibilities of establishing a cooperative to continue his needlework operations outside the scope of the Act (R. 711), using Palmer's factory and equipment and employing his services as manager (R. 718, 775, 928). Palmer was interested and proceeded to interest his workers (R. 715, 775). He distributed a circular among them advising that cooperatives would be outside the Wage and Hour law (R. 263–264) and told them that they would be without work unless they formed a cooperative (R. 775).

In the circular he urged the immediate organization of the cooperative "to permit us to continue working under the conditions more or less as we are working at the present time" (R. 263). The circular further stated (R. 264):

> If fortunately Puerto Rico in the near future becomes exempt from complying with the law, or that the situation in the industry is arranged in any other way, then the cooperative will be dissolved.[5] * * *

The motives of Palmer and his wife in the formation of the cooperative are revealed by letters written by them during this period (R. 223, 311–313).

[5] This statement by Palmer should be compared with the provision in the Articles of Incorporation which required that the manager "must be a person who sincerely believes in the principles of cooperativism" (R. 101). Palmer was to be and became that manager.

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These letters definitely indicate a plan to use the device of a cooperative to continue their business operations unchanged and without complying with the labor standards established by the Act.[8]

After considerable discussion of the plan by Palmer with the workers, Soltero organized the cooperative with a committee composed largely of Palmer's department heads and higher-paid employees as incorporators (R. 731–734). Palmer guaranteed Soltero's legal fees for this work (R. 134). Soltero showed Palmer the Articles and By-laws as soon as they were drawn up (R. 738). He consulted Palmer throughout the organization period and followed closely Palmer's business organization as the pattern for the new operations (R. 740, 936).

The Articles (R. 36–63) and By-laws (R. 63–132), discussed in detail in the opinion below (R.

[8] On August 15, 1938, Palmer wrote a long letter to his agent, Garcia, in New York, explaining his plans concerning the cooperative. The letter said in part (R. 313) "I gave instructions to friend Soltero to proceed immediately to the organization of the Caribbean Embroidery Cooperative, a thing which has been agreed upon by Castillo and me to see whether, in this manner, we do not have to stop our work for even a single day." He wrote that he was seeing the employees to "hasten the establishment of the cooperative, but, naturally on the basis of dealing only and exclusively with me." Garcia was advised to let the customers know that "we are taking the necessary steps to continue our business after the minimum wage law goes into effect." Secrecy was suggested so that competitors in Puerto Rico would not "get a notion to do the same."

966–973), are lengthy and complex. They purport to incorporate a "cooperative association" under the Puerto Rican laws to promote, among other things, "the knowledge and practice" of the needlework industry "as a source of income for the benefit of the workers" (R. 36). Applicants for membership were required to affirm their belief in "cooperativist principles" (R. 66, 229); and to subscribe to one share of stock, par value $10 (R. 72).

Although ostensibly following cooperative forms, real control over the business in all its phases was, by the Articles and Bylaws, vested in the Manager, Palmer,[7] limited only by the theoretical power of the Board of Directors to review his decisions. He was given power to choose supervisors (R. 282), to evaluate the efficiency of members; to suspend and discipline them (R. 70, 282); to apportion work among them in times of scarcity (R. 122). He established the schedule of *anticipos* or advances paid to the workers (R. 126) and the Bylaws empowered him to establish the contract prices (R. 127). The Board of Directors was composed

[7] Mrs. Palmer as assistant manager exercised all the manager's powers in her husband's absence (R. 103). His brother-in-law was secretary-treasurer (R. 744, 138) and on the Board of Directors and the executive committee (R. 819). The complex method provided for amending Articles or Bylaws, described by the lower court, permitted a single dominant officer or member effectively to block any change (R. 978–979).

chiefly of former supervisory employees (R. 733) and was virtually self-perpetuating.[8] In two years of operations covered by the record every important action of the manager which called for approval by the directors was approved unanimously (R. 791, 794, 821, 858, 885).

The business of the cooperative was conducted in the same manner as when Palmer was admittedly the owner (R. 756).[9] The Company's premises and equipment were leased by Palmer to the cooperative (R. 759).[10] The manufacturing process and departmental organization were in no way altered (R. 760). Distribution and sales were through the same channels (R. 760). The personnel and their duties remained unchanged (R. 756, 757, 759, 760, 843, 881), and the workers received in the form of *anticipos* and so-called dividends,[11] earnings no greater than their meager

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[8] The opinion below analyzes the provisions of the Articles and Bylaws giving the original Directors unusual powers with respect to the choice of their successors (R. 967–968, 977–978).

[9] As Palmer testified, "the business has continued and still continues almost the same as before the cooperative was established" (R. 756).

[10] In arriving at a valuation for the plant and equipment no independent appraisers were used but a committee consisting of two of Palmer's supervisory employees and his brother-in-law accepted the valuation submitted by Palmer (R. 142, 753, 890).

[11] The *anticipos* were advances on a piece-work basis similar in amounts to the rates the workers were paid by the old company (R. 756–757, 820, 868, 870, 872, 881, 899, 900). A reserve of 2 percent of gross income was set up for "divi-

wages when employees of the Caribbean Embroidery Company [12] (R. 756–757, 820, 868, 870, 881, 889, 900).

In addition to managing all the technical aspects of the venture (R. 777), the financial interest in the business was almost entirely Palmer's. The plant and equipment were his (R. 281);[13] he advanced by interest-bearing loan the working capital (R. 281, 288);[14] his "salary" as manager was 10 percent of the *gross business* (R. 284), which gave him a personal income from the business greater than it had ever been before (R. 762–763, 784); he guaranteed the performance of the contracts of the cooperative (R. 760–761, 226–228).

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dends" to members (R. 822, 823, 825). Dividends were in reality merely wages, the payment of which was delayed. For the first 14 months of operation the "direct workers" received in *anticipos*, an average of $83.60 per worker; the 18 supervisors an average of $269.10 each, and each of the 3 office workers $811.50. In addition, the average dividend of "direct" workers was $5.33; the supervisor's share averaged $86.04; and the office worker's $259.48. These computations are made from the annual reports of the auditor (R. 496–532).

[12] "*A Report on Puerto Rico: The Needlework Industry*" prepared in the Wage and Hour Division in 1940, which was cited by petitioners in their brief below (R. 976), found from a survey made by the United States Department of Labor in 1933–1934 that 84 percent of the home workers "were earning 3 cents or less per hour."

[13] The plant and equipment were valued, for purposes of computing the rental, at $25,000 (R. 751, 753).

[14] By the loan contract Palmer agreed to lend up to $20,000 at 6 percent interest (R. 288).

By the management contract there was delegated to Palmer subject to the Board's approval "all the necessary powers" to direct the venture (R. 282). That contract could be terminated by either party on 30 days' notice (R. 285), and termination of the management contract permitted total rescission of the loan agreement (R. 283, 290).[15] In that case the debt became due, and Palmer was empowered to take over the cooperative "until the total liquidation of the debt" (R. 283).

The financial interest of the members was meager. As of December 15, 1939, paid-up capital amounted to $1,224.71 (R. 500), and organization expenses had consumed $1,031.58 (R. 502). In March 1940, about 18 months after the formation of the cooperative, only 20 members out of 1,335 owned fully paid-up ($10) shares (R. 767). In September 1940, at the time of the trial, only "100 to 150" of the some 1,200 home worker-members had paid the $2.50 required for the right to vote (R. 782).[16]

The participation by the members in the control of the cooperative was as slight as their financial interest. The workers, largely illiterate and uninformed, understood little of the elaborate arrangements (R. 863, 933, 866, 867). Only one

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[15] The lease also was apparently terminable in this event. (R. 296; cf. R. 285).

[16] At the only general assembly in February 1940, 183 out of a membership of over a thousand were entitled to vote and only 116 exercised the right (R. 494, 462–465, 481, 483).

general assembly of the workers was held—14 months after the cooperative was organized (R. 736). A small percentage of members attended, and, as has been indicated, few were qualified to vote. Each "process" or class of workers was entitled to one representative on the Board of Directors (R. 91). The home workers,[17] who numbered about a thousand (R. 494), were entitled to no larger number of representatives on the Board than the three members (R. 494) of the stamping or office department. The numerous committees, including the Executive Committee, had only advisory functions (R. 107–117). The Executive Committee could "not make decisions that would obligate the Manager * * *" (R. 109). The members of the Board of Directors, because of their economic dependence upon Palmer, were in no position to and never challenged Palmer's control (R. 821, 794, 858, 885).

All that the illiterate workers understood of the elaborately organized cooperative set up by Palmer and Soltero was that unless they were members they could not work (R. 866–867, 863). Palmer, on the other hand, "spoke as a man who had the power of life and death over the cooperative and

[17] For the first year after the Act was passed no home workers were admitted to membership since it was believed they were not the cooperative's employees (R. 765); only after the Wage and Hour Division announced its opinion that they were employees of the cooperative and not of the distributors was a drive undertaken to enlist them as members (R. 764).

could dictate terms to it," as the court below put it (R. 976).

A short summary of the facts cannot do justice to the large number of contemporary documents and the mass of other evidence in the record, which show irresistibly that after the formation of the cooperative, as before, Palmer ran the business. The workers continued to be employed by him. The form was changed but not the substance of the relationship. There was no break in the continuity of the employment or of the substandard labor practices which the Fair Labor Standards Act outlawed.

ARGUMENT

1. The petition raises no questions of general importance. The decision below turns upon the facts of this particular case. It is not disputed that if the Cooperative was a sham, set up and controlled by Palmer, the petitioners are employers subject to the provisions of the Act.[18] The primary question is whether the Circuit Court of Appeals properly concluded that this record plainly required a holding that the cooperative was not genuinely controlled by the employees. The evidence summarized in the Statement, *supra,* shows indisputably that the court below reached the correct

[18] It is, of course, the substance of the relation and not the form which controls the application of the statutory provisions. *Gregory* v. *Helvering*, 293 U. S. 465; *Utility Coal Co.* v. *Rogez*, 170 Okla. 264, 39 P. (2d) 60; *Montello Granite Co.* v. *Industrial Comm.*, 227 Wis. 170, 278 N. W. 391.

conclusion. The Circuit Court of Appeals' refusal to sanction a device designed to evade the Act by changing the form of petitioners' business while preserving all its previous attributes plainly presents no question worthy of review.

It is well settled that where the district court's findings of fact [19] are clearly erroneous, the Circuit Court of Appeals may set those findings aside. *Aetna Life Ins. Co.* v. *Kepler,* 116 F. (2d) 1, 5 (C. C. A. 8); *Beckley National Bank* v. *Boone,* 115 F. (2d) 513 (C. C. A. 4); *Kuhn* v. *Princess Lida of Thurn and Taxis,* 119 F. (2d) 704 (C. C. A. 3); *Keller* v. *Potomac Electric Co.,* 261 U. S. 428, 444. Rule 52 (a) of the Federal Rules of Procedure [20] expressly so provides.

2. Petitioner contended in both courts below that a cooperative association is a "labor organization" and is excluded from the definition of an employer under Section 3 (d) of the Act. The trial court did not pass upon this contention. The Circuit Court of Appeals concluded that since the Palmers controlled the cooperative it was not a "labor or-

[19] Although denominated "Findings of Fact," these expressions of the trial court are in reality either conclusions of law or inferences from the essentially undisputed facts. Although perhaps not required to, the Circuit Court of Appeals, nevertheless, did accord the court's findings the same respect which properly attaches to a trial court's appraisal of conflicting evidence (R. 960, 975–976, 980).

[20] See also, note of Advisory Committee to Rule 52 (a), 28 U. S. C., p. 2640.

ganization within the meaning of Section 3 (d)" (R. 981). Accordingly it was not called upon to, and did not, decide the question petitioners seek to raise as to whether a genuine labor cooperative might be a labor organization.[21] Nor did the court below find it necessary to consider respondent's contention that the Act was applicable to petitioners even if the cooperative was genuinely owned and controlled by its members. These questions would not be before this Court unless it overturned the decision below as to the exercise of control by the Palmers rather than by the employees.

CONCLUSION

The petition presents no question of general importance, and there is no conflict of decisions; it should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor.

IRVING J. LEVY,
Associate Solicitor,
United States Department of Labor.

MARCH 1942.

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[21] The purpose of the exception in Section 3 (d) obviously was to avoid any question of employment relationship between a *labor union* and its members. Cf. National Labor Relations Act, Section 2 (2), 49 Stat. 450, 29 U. S. C. Section 152; S. Rep. 573, p. 6, 74th Cong., 1st Sess.

APPENDIX

Fair Labor Standards Act, 52 Stat. 1060 (29 U. S. C., sec. 201, *et seq.*).

Sec. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

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